

Doors Will Open on the Liberal-Hand Side

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Maximilian Steinbeis Sa 17 Feb 2018

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Dear Friends of Verfassungsblog,

When will it finally be like it never was again? This current novel title comes to mind when I look at the current debate on the right-left balance at the German Federal Constitutional Court. That balance might be about to tilt, according to media reports and apparently the horrified perception in Karlsruhe itself. According to the informal rules for the filling of vacant posts on the Court's bench, the outgoing Justice Michael Eichberger, a nominee of the conservative CDU/CSU, will be replaced by a nominee of the Greens. This would mean that the First Senate – allegedly the more progressive of the two Senates to begin with – would, for some time at least, comprise of three Social Democratic and two Green nominees on the progressive side, and one libertarian/liberal FDP plus merely two CDU/CSU nominees on the conservative side.

Five progressive judges versus three conservative ones? Is the Senate shifting to the left? Is the revered Federal Constitutional Court at risk of being perceived no longer as an impartial and independent body of justice, but instead as a majoritarian tool of particular political interests – Karlsruhe's worst nightmare?

I do not deny at all that this fear is very much justified. The authority of a court whose members operate and/or are perceived largely along the lines of their party affiliation will suffer, with the US Supreme Court as the most impressive example. Neither am I one of those who think that the classic right/left distinction has run its course and should be done away with – quite the contrary, given the rising tension between property rights and social justice. But the right/left polarization is superimposed, maybe even leveled to some degree by a different polarization which comes from the right without its opposing pole necessarily being the left: the systemic critique by the so-called “right-wing populists” of the idea that majority power and the “will of the people” should be constituted and constrained by constitutional law, which amounts to a fundamental attack against the function of constitutional jurisdiction itself. For them, the Constitutional Court is little more than a political tool to begin with – a tool which at the moment still is held by their opponents, but, once they have become powerful enough to take over control of its personnel decisions, one day will be their's.

From their point of view, any nomination, no matter by whom, is a scandalous political attack against themselves unless it's one of their own that is nominated. And to nominate one of their own is categorically not an option as long as their own hold by definition a politicized view of the function of the Constitutional Court. How to get out of this dilemma is the defining question of our time, not only in terms of nominating justices, but also in terms of parliament and opposition rights, party and electoral law and media coverage.

In any case, the old progressive/conservative poles of tension are obviously no longer as clearly assignable to the German parties in parliament as they used to be in the grand old days of the old pre-millennial *Bundesrepublik*, with Social Democrats and Greens jointly cutting social welfare on an unprecedented scale and conservative CDU/CSU MPs voting *en masse* for marriage for all. To make things even more complicated: There is another field of tension that is arguably even more important in a parliamentary democracy than the progressive/conservative one, and that is the tension between government and opposition. In these times of a seemingly unavoidable, *nolens volens* “Grand” Coalition, with progressives (SPD ⇌ Greens, Leftists) and conservatives (CSU ⇌ FDP) on both sides, it appears rather simplistic to just balance the composition along the lines of left and right. If the result is to take the nomination right away from the Green opposition party and hand it over to the governing CDU/CSU, that looks like a move no less detrimental for the internal balance of the Senate than the other way around, as then six out of eight Justices in the First Senate would be nominated by governing parties.

No time for nostalgia

Don't we all long for the days of yore when left and right still wore bright party colours and a fair mixture of those was all that was needed to provide for a non-partisan Court? We do, I guess, and for fair reasons. But nostalgia is never a solid ground to base political decisions on, least of all in these trying times. In any case, as far as the Federal Constitutional Court is concerned, I am not even sure if this nostalgia has all that much historical substance after all. When since the Adenauer era was the progressive-conservative balance on the bench ever a real factor in the court's judicial practice? The First Senate has erected some of its most impressive milestones of liberal fundamental rights judicature under the chairmanship of Ernst Benda and Roman Herzog, who both had previously served as CDU ministers of the interior. In the Second Senate, SPD members Ernst-Wolfgang Böckenförde and Ernst Mahrenholz took part a number of distinctly non-progressive decisions, for example when they declared the municipal elective franchise for foreign residents of Hamburg and Bremen unconstitutional.

The court is justifiably proud of the great power of integration of its culture of debate which is first and foremost characterised by legal rationality. Pushing a political agenda will get you nowhere in both of the Senates, I keep hearing and have no reason not to believe it. What matters is the power of your legal argument. All judges, no matter which party they owe their office to, have a most powerful incentive to make their senate colleagues forget their political leanings as quickly and completely as possible. Some who did not heed that advice could be seen shuffling through the corridors of the Karlsruhe court, isolated and unhappy, for years. You don't want to end up that way.

Preserving this culture of non-partisan rationality should be the principal yardstick for the selection of judges, no matter which party nominates them. And that is perhaps a starting point if we ask ourselves how to respond to the changed times. The judges are elected by two-thirds majorities in the *Bundestag* and *Bundesrat*, respectively. I don't think it's out of the question that one day the far-right AfD party will possess a blocking minority in the German *Bundestag* (as the Greens already have in the *Bundesrat* through their coalition participations in the states). Then they can effectively prevent any election of new justices

in parliament from happening, for months and years, until the majority cedes them the right to nominate someone of their own. They have some really, really awful potential candidates in their ranks, like the MP and former Dresden District Court judge Jens Maier who is currently under investigation after a jaw-droppingly brutish racial slur against former tennis star Boris Becker's son was posted on his Twitter account. To field a candidate like that would be just their thing. Everybody would completely go off the wall, rightly so, while the AfD could paint themselves once again as victims of establishment perfidy and the Court as the very political tool of majority interests they want to turn it into in the first place.

In case that ever happens, we should better have prepared and established in practice a set of sound and well-reasoned criteria which AfD or other nominees are acceptable and which are not. And these must not be political criteria, but oriented towards protecting the constitutionalist culture in the court. Not an easy task.

Tailspinning

The opposite position, in terms of conclusion, is taken by SASCHA KNEIP who calls on the Greens, with arguments well worth consideration, to forego their right of nomination for the time being to keep the “appearance of structural progressive or conservative majorities in the Senates” from solidifying (German).

Speaking of political parties – the latest loop in the breath-taking tailspin of **German** Social Democracy was marked by the idea of electing Andrea Nahles as provisional SPD chairperson by an executive committee vote, although it is crystal clear that federal law reserves that competence to the federal party convention. HANS MICHAEL HEINIG has pointed out this fact immediately before the meeting of the party executive committee (German). I like to imagine that someone had the presence of mind to alert the committee of Heinig's post as they met and thereby convinced them to vacate that untenable position at the very last moment. Whether or not that actually happened I don't know, but I very much enjoy the idea, unsurprisingly.

VIKTOR ZÓLTAN KAZAI describes the creative unruliness of the parliamentary opposition in **Hungary** who have to find novel ways to make their voices heard against the overwhelming majority of the governing Fidesz party which has shown little trepidation to squeeze the air out of the remaining opposition with as much force as they can muster.

In **Austria**, the ÖVP/FPÖ coalition is planning a comprehensive criminal law reform, the necessity of which lies primarily in the fact that so many Austrians have expressed their desire on Facebook see criminals punished more harshly. JULIA REITER reports (German).

In **Switzerland**, a popular initiative is currently underway to establish in the constitution the liability of companies for human rights and environmental violations abroad. ELIF ASKIN comments (German).

Myanmar is currently the scene a genocidal drama of rarely seen proportions. ROMY KLIMKE examines whether the crimes committed against the Rohingya could be a case for the International Criminal Court (German).

German asylum courts need to gain knowledge about the factual conditions in the asylum seeker's country of origin which can hardly be gained with ordinary judicial means of discovery. LUKAS MITSCH and KATHARINA REILING shed light on what German asylum justice could learn from their British counterparts in this respect (German).

Human rights and economic policy are often seen as opposites in international law. VILJAM ENGSTRÖM examines whether this is still true.

Elsewhere

HANS HOSTEN analyzes a draft bill on **German** citizenship law tabled by the AfD, which seeks to replace *Ius Soli* with *Ius Sanguinis*, and asks about the concept of nationality behind that move.

FRED FELIX ZAUMSEIL deals with the crisis of authority in liberal democracies and argues that neither the authority of experts nor that of democratic majorities provide for a way out.

MEG RUSSELL and JACK SHELDON examine what a parliament for hitherto parliament-less **England** could look like if the English Members of the British Parliament in Westminster were to be put in charge of that function, and point out the many difficult questions that such a step would raise.

ANTONY SFEZ describes the “court battle” over **Catalan** ex- and exile president Carles Puigdemont and his hope of being re-elected *in absentia* (French).

MATTEO MONTI considers the objections to the **Polish** Holocaust law and its consequences for freedom of speech to be largely justified (Italian).

The Strasbourg Observers Blog has, as every year, identified the best and worst judgement of the European Court of Human Rights among its readers. The winner is: *N. D. and N. T. v. Spain*, the verdict on the pushback of refugees in Melilla, as the best, the bluntly homophobic dissenting opinion of Russian judge Dedov in *Bayev v. Russia* as the worst.

MANUEL MÜLLER laments the decision of the majority in the European Parliament to vote against the introduction of transnational lists in the European elections in 2019.

LAURA BALLARIN CEREZA hopes that the “*Spitzenkandidaten*” process will be put to use again in the next European elections and that this “will open an irreversible path to democracy in Europe” (Spanish).

JONATHAN H. ADLER reports on conservative arguments why conservatives in the **USA** should not invite an alt-right provocateur like Milo Yiannopolous to their university.

PIERRE DE VOS examines – even before the resignation of **South Africa's** President Jacob Zuma – what would have happened if he had not resigned.

That's all for now. Have a successful week, all best, and take care!

Max Steinbeis

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